PT Anekapangan Dwitama v Far East Food Industries Sdn Bhd

HIGH COURT (KUALA LUMPUR) CIVIL SUIT NO D2-28-357-1993
RICHARD TALALLA J
22 SEPTEMBER 1994

Companies and Corporations — *Winding up — Inability to pay debts — Whether court should appoint provisional liquidator — Whether company had rebutted presumption of inability to pay debts under s 218(1)(e) of the Companies Act 1965 — Whether company had made preferential payments to creditors after presentation of petition — Whether rights of creditors jeopardized — Companies Act 1965 ss 218(1)(e), 223 & 293*

The respondent was a manufacturer of instant noodles and the petitioner was the supplier of seasoning to the respondent for which US$705,714 as at 3 August 1993 was claimed to be due and owing to the petitioner. The petitioner brought a winding-up petition against the respondent pursuant to s 218 of the Companies Act 1965 ('the Act') on the grounds that the respondent was unable to pay its debts. The respondent's balance sheet as at 30 April 1994 showed that it had accumulated losses of about RM4.7m. Pending the disposal of the petition, the petitioner filed an application ('this application') for a provisional liquidator to be appointed and alleged that the respondent had continued to make payments to certain creditors after the presentation of the petition in contravention of ss 223 and 293 of the Act. The respondent applied to strike out the petition and opposed this application on the grounds, inter alia, that it had a counterclaim against the petitioner for about RM2.4m due to breach of contract arising from the supply of unmerchantable seasoning and loss of profits arising from non-supply of seasoning by the petitioner. The respondent also submitted that it had been insolvent for many years due to its policy of deliberate undercapitalization and if its shareholders' advances were converted to capital, it would not be insolvent.

Held, allowing the application for the appointment of a provisional liquidator pending disposal of the winding-up petition:

(1) The respondent had failed to rebut the presumption which arose under s 218(1)(e) of the Act that it was unable to pay its debts since it had failed to pay the debt within 21 days of service of the notice of demand. The counterclaim alleging loss of profits and unmerchantable quality was unsupported by evidence and mala fides, made for the sole purpose of blocking this application.

(2) The submission on undercapitalization was purely suppositional and the argument did not assist the respondent in establishing that it was able to pay its debts.

(3) It was clear that the respondent had been making preferential payments to some creditors in contravention of ss 223 and 293 of the Act and no application for a validation order had been made. Such payments would be void or voidable in the event of the respondent's winding up.

(4) With a history of continuous and continuing trading losses, the creditors' rights should not be further eroded by the respondent continuing to trade, in all probability at a loss, to the disadvantage of the creditors. The petitioner would be in a worse position if the appointment of a provisional liquidator was delayed and that consideration outweighed the consequences to the respondent.

[Bahasa Malaysia summary

Responden adalah pengilang mee segera dan pempetisyen adalah pembekal perasa kepada responden untuk mana sejumlah US$705,714 setakat 3 Ogos 1993 dituntut sebagai dihutang dan kena dibayar kepada pempetisyen. Pempetisyen telah membawa suatu petisyen penggulungan terhadap responden di bawah s 218 Akta Syarikat 1965 ('Akta itu') atas alasan bahawa responden tidak mampu membayar hutangnya. Kunci kira-kira responden pada 30 April 1994 menunjukkan bahawa ia mempunyai hutang terkumpul sebanyak RM4.7 juta. Semasa menunggu penyelesaian petisyen itu, pempetisyen telah memfailkan suatu permohonan ('permohonan ini') supaya seorang penyelesai sementara dilantik dan mengata bahawa responden masih terus membuat bayaran kepada beberapa penghutang tertentu selepas penyampaian petisyen itu, yang melanggar ss 223 dan 293 Akta itu. Responden telah memohon untuk membatalkan petisyen itu dan menentang permohonan ini atas dasar, antara lain, bahawa ia mempunyai suatu tuntutan balas terhadap pempetisyen untuk lebih kurang RM2.4 juta kerana kemungkiran kontrak yang timbul akibat daripada pembekalan perasa yang tidak boleh dagang dan kehilangan keuntungan yang timbul akibat daripada kegagalan pempetisyen untuk membekalkan perasa tersebut. Responden juga berhujah bahawa ia telah lama tidak solven kerana polisi kurang modal yang sengaja dan jika pinjaman pemegang sahamnya dijadikan modal, ia tidak akan menjadi tidak solven.

Diputuskan, membenarkan permohonan bagi perlantikan seorang penyelesai sementara semasa menunggu penyelesaian petisyen penggulungan itu:

(1) Responden gagal mematahkan anggapan yang timbul di bawah s 218(1)(e) Akta itu bahawa ia tidak berupaya membayar hutangnya kerana ia gagal membayar hutang itu dalam tempoh 21 hari daripada penyampaian notis tuntutan. Tuntutan balas yang mengata tentang kehilangan keuntungan dan kualiti tidak boleh dagang tidak disokong oleh keterangan dan adalah mala fides, dibuat hanya bagi tujuan menghalang permohonan ini.

(2) Penghujahan tentang polisi kurang modal itu adalah semata-matanya suatu anggapan sahaja dan penghujahan itu tidak menolong responden untuk menunjukkan bahawa ia berupaya membayar hutangnya.

(3) Adalah jelas bahawa responden telah membuat bayaran keutamaan kepada beberapa penghutang bertentangan dengan ss 223 dan 293 Akta itu dan permohonan untuk perintah pengesahan tidak dibuat. Bayaran sedemikian akan menjadi terbatal atau boleh batal jika responden digulung.

(4) Dengan sejarah perniagaannya yang telah dan masih mengalami kerugian, hak penghutang tidak seharusnya dihakis lagi dengan membenarkan responden meneruskan perniagaan, apabila besar kemungkinan ia akan menanggung kerugian, yang akan merugikan penghutang. Pempetisyen akan berada dalam kedudukan yang lebih buruk jika perlantikan penyelesai dilengahkan dan pertimbangan itu lebih penting daripada akibat kepada responden.]

[*Editorial Note*: The respondent has appealed to the Federal Court vide Civil Appeal No 02–350–94.]

Notes

For cases on winding up due to inability to pay debts, see *Mallal's Digest* (4th Ed, Reissue) paras 433–468.

Cases referred to

Cyona Distributors Ltd, Re [1967] Ch 889; [1967] 1 All ER 281; [1967] 2 WLR 369 (refd)

Highfield Commodities Ltd, Re [1984] 3 All ER 884; [1985] 1 WLR 149 (refd)

Hongkong & Shanghai Banking Corp Ltd v Kemajuan Bersatu Enterprise Sdn Bhd [1992] 2 MLJ 370 (refd)

Hwang Chin Hor & Ors v Song Seng Sdn Bhd & Ors [1990] 2 MLJ 105 (folld)

Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (folld)

MBf Finance Bhd v Sri Hartamas Development Sdn Bhd [1992] 1 CLJ 160 (refd)

R v Grantham [1984] 3 All ER 166 (refd)

Setapak Tin Syndicate Ltd & Anor v Choo Kim Peng [1947] MLJ 174 (folld)

Legislation referred to

Bankruptcy Act 1967 s 53(1)

Companies Act 1965 ss 218(1)(e), 223, 231, 293(1), (2), 303(3), 304(1)

Companies Act 1948 ss 238, 332(1) [UK]

LY Oon (*Suhaimi, Khor, Zulkifli & Chang*) for the petitioner. A
R Rajasingam (*R Rajasingam & Co*) for the respondent.

Richard Talalla J: This is a winding-up petition brought pursuant to s 218 of the Companies Act 1965 ('the Act') on the grounds that the respondent ('the company') is unable to pay its debts. The petitioner has B filed an application ('this application') for an order that a provisional liquidator in respect of the company be appointed pending the disposal of the petition. The company also filed an application seeking an order to strike out the petition. It was agreed between counsel for the two parties that this application be heard first and that the hearing of the petition and the application to strike out be adjourned pending the outcome of a related C action, namely, D4–22–1149–93 ('the D4 action').

The petitioner's notice ('the notice') under s 218 of the Act was issued on 19 August 1993 and served five days later, on 24 August.

Section 231 of the Act empowers the court to appoint the Official Receiver or an approved liquidator provisionally at any time after the D presentation of a winding-up petition and before the making of a winding-up order.

In *Palmer's Company Law* (23rd Ed) at pp 1143 and 1144 it is stated as follows:

> The primary object of appointing a provisional liquidator is to maintain the status quo and to prevent anybody from getting priority. The appointment is not only provisional but contingent in this sense, that it operates to protect the property for an equal distribution only in the event of an order for compulsory liquidation being made; if no such order is made, then the appointment ought not to interfere with the rights of third persons. E F

Sir Robert Megarry V-C in the case of *Re Highfield Commodities Ltd* [1984] 3 All ER 884; [1985] 1 WLR 149, considering an application to appoint a provisional liquidator, held that the court would not usually exercise its power under s 238 of the 1948 Act to appoint a provisional liquidator unless there was at least a good prima facie case for a winding-up order to G be made. However, the court's power to appoint a provisional liquidator was general in scope and was not restricted to cases where the company was obviously insolvent or where it was otherwise clear that it was bound to be wound up, or where the company's assets were in jeopardy. Furthermore, the power was discretionary and, in addition to being required to be exercised judicially, the need for the exercise of the discretion should H outweigh the consequences to the company.

It is stated by Walter Woon in his book on *Company Law* at pp 497 and 498:

> Where the application for the appointment of a provisional liquidator is I opposed, it is the court's duty to weigh the urgency and need for the appointment of a provisional liquidator and decide where the balance of convenience lies. The court's discretion is not limited to a specific situation and a provisional liquidator may be appointed whenever the court feels that

A it is in the interest of the company, the creditors or the contributories to do so.

In the case of *Hwang Chin Hor & Ors v Song Seng Sdn Bhd & Ors* [1990] 2 MLJ 105, Abdul Malek J was dealing with an application to appoint provisional liquidators pending the hearing of the winding-up petition. B The learned judge held, following the ruling in *Setapak Tin Syndicate Ltd & Anor v Choo Kim Peng* [1947] MLJ 174, that before a court can make an order for the appointment of an (interim) receiver, it must be satisfied that the plaintiff had established a good prima facie claim to title, that the property was in jeopardy and, at the very least, that the party applying would be in a worse position if the appointment of the receiver was C delayed.

In the case of the *Hongkong & Shanghai Banking Corp Ltd v Kemajuan Bersatu Enterprise Sdn Bhd* [1992] 2 MLJ 370, the court considered various authorities relating to the grounds upon which the court would order appointment of a provisional liquidator. VC George J, in delivering the D judgment of the court stated, at p 376:

> The circumstances in which the courts have made the orders vary infinitely. I think it is useful to quote the passage from the 1975 judgement of Bright J of the Supreme Court of South Australia in *Re Club Mediterranean Pty Ltd* (1975) 11 SASR 481 at p 484 that McPherson on *The Law of* E *Company Liquidation* (3rd Ed) quotes at pp 100 and 101:
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> > 'Where the petitioning creditor makes the application and the company opposes it the court must come to a conclusion as to the degree of urgency and of need established by the petitioning creditor and the balance of convenience. The circumstances will vary. Sometimes the company may be continuing to trade at a loss or to incur further F liabilities. Sometimes assets may require to be protected from dissipation or from seizure or encumbrance. Sometimes the right of the company to assets or the right to exercise an option, enforce a contract, reject a claim or otherwise to act for the apparent benefit of the company may be in issue and the issue may need to be resolved or carried forward or rights may need to be protected as a matter of urgency. Sometimes the G company may be paralysed by a dispute between shareholders or directors, or by some form of interim court order. Sometimes there may be a conflict of interest between a director or principal officer of the company itself with regard to some right of property, and that conflict may render it difficult for the company's rights to receive proper protection.'

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The learned judge, recognizing that the appointment of a provisional liquidator has been described as having the effect of paralysing the company, went on to hold at pp 376 and 377 as follows:

> It is for this reason that it been judicially established that on the proper I exercise of its discretion the court must be satisfied that ultimately the court is likely to make the winding-up orders sought in the petition which has been described as the 'threshold test' in *Re Qintex Ltd (No 3)* [1990] 2 ACSR 627 at p 638. In *Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732 at p 738, Master Lee said:

> 'Whilst the ultimate fate of the petition must be left to the court finally hearing the matter, a provisional liquidator will not usually be appointed unless it appears in the material that a winding-up order is likely .... This presupposes that there should be adequate evidence adduced on an application for appointment of a provisional liquidator to show that a winding up is, in the absence of material to the contrary, likely.'

The company was incorporated on the 12 August 1970. Its object was the carrying out of the manufacturing of instant noodles and it possesses a manufacturing licence from the Ministry of Trade and Industry to produce the same. The petitioner was the supplier of seasoning to the company for which a sum of US$705,714 as at 3 August 1993 was claimed to be due and owing to the petitioner.

There was exhibited to the affidavit in support of this application the directors' and auditors' reports pertaining to the financial status of the company prepared by Messrs Arthur Andersen. At p 3 of the directors' report, it was stated that the accumulated losses carried forward for the financial year ending 31 December 1992 amounted to RM3,557,011. The auditors' opinion on the financial status of the company was as follows:

> As at 31 December 1992, the company has net current liabilities of RM3,859,325 and deficit in shareholders' funds of RM2,552,005. The continuation of the company as a going concern is dependent upon it obtaining additional financing and achieving profitable operations.

The balance sheet of the company as at 30 April 1994 showed the company to have accumulated losses of RM4,710,952. The claim of the petitioner as above stated is reflected in the company's accounts. See the financial statement of the company as at 15 July 1993. None of the facts set out in this paragraph has been denied, nor that the company has been continuing to trade and has been making payments to certain of its creditors.

The company's case as deposed to by its managing director ('the director') was that the company constitutes a joint venture in Malaysia between the Jangkar Jati and the Salim Groups in Indonesia, that these two groups had also formed a joint venture company, namely, 'Indofood' in Indonesia and one of the subsidiaries of Indofood is Anekapangan Dwitama, the petitioner, that arising from the joint ventures, there was a close working relationship between the company and the petitioner which resulted in there being co-operation and interdependence between the petitioner and the company, that the petitioner became the sole supplier of seasoning to the company as this was part of the joint venture in Malaysia and Indonesia and that as such, the company never had to seek other sources for the supply of seasoning.

It was deposed further by the director on behalf of the company that arising from a shareholders' dispute between the Jangkar Jati Group and the Salim Group in or about 1992, the relationship between the joint venture parties in Malaysia and Indonesia deteriorated, that the dispute between the parties is presently litigated in the D4 action and that the petitioner stopped supplying the seasoning to the company purely as a result of the dispute without any justification and that this had resulted in

A the company's operations being severely affected and loss of profit in respect of which the company complained to the petitioner by letter repeatedly between 29 May and 9 July 1993.

Further, so the director deposed, by way of a letter dated 20 July 1993, the company again informed the petitioner that the sudden non-
B supply of seasoning since May 1993 had resulted in considerable loss to the company and that the losses had to be debited and also that the March 1993 shipment of seasoning as per a certain invoice would also be debited as, so it was alleged, 60% of it was found to be of unmerchantable quality and the company did by way of debit note dated 20 July 1993 debit the petitioner in the sum of RM534,326.91.

C The director deposed to a belief that the company had a counterclaim against the petitioner in the sum of RM2,431,798.91 which comprised the amount raised in the said debit note and loss of profit arising from inability to meet orders and from meeting orders at higher seasoning costs, apparently as a result of non-supply of seasoning by the petitioner, and a statement
D showing the alleged loss of profit was produced.

Such being the case, so the director deposed, the alleged debt claimed by the company was, in good faith, substantially disputed, that that being so, a winding-up petition was not the legitimate means of seeking to enforce payment of a debt which was bona fide disputed, that the winding-
E up court should not be used as a debt-collecting agency nor as a means of bringing improper pressure to bear on the company and that the petitioner had not only abused the process of court but had also filed a frivolous and vexatious action, even after having been informed that the debt was disputed.

F Lastly, the director deposed that the company employs general staff and production workers totalling about 155 persons who were vital for the purposes of enabling the company to meet its commitments under on-going transactions and that amongst other things, their salaries and work related expenses would have to continue to be met.

Counsel for the company submitted that as at the date of presentation
G of the petition, the said sum was not due as there was a credit limit of US$500,000, the petitioner having granted the company the said credit for a period of 90 days. The affidavit evidence shows that the last invoice was dated 5 May 1993. The amount therein was due on 3 August 1993. Therefore, when the petitioner issued the notice, all invoices stated therein
H had already exceeded the credit limit. As at the date of service of the notice, the credit limit had been exceeded by US$205,714.

As to the company's claim for loss of profits allegedly suffered as a result of the petitioner's failure to supply seasoning to the company, the view I take is that it is untenable in law and wholly unreasonable to expect
I the petitioner to supply the same without payment. There was not a whit of independent evidence, affidavit or otherwise, as to why the company could not obtain seasoning from another source. A reasonable inference is that the company could not do so because it had no money to pay for the same. There was an oblique reference to the petitioner's seasoning being

of a special kind which could not be substituted. There was nothing to substantiate this claim. On the contrary, if the claim had substance, it would have had to follow that the company would have had to close down its operations but far from it, the company by opposing this application has evinced a desire to carry on trading which indicates that indeed the company must be obtaining seasoning from a source other than the petitioner. In any event, the company's account for loss of profits in this regard is not supported by the accountants or auditors and smacks of mala fide set up for the sole purpose of blocking this application. Likewise the company's complaint of the unmerchantable quality of seasoning by the petitioner. The last invoice relating to the alleged defective seasoning was dated 5 May 1993. Yet it was only after the notice was issued that the company raised its complaint. The company's excuse that it did not complain earlier because it did not want to sour its relationship with the petitioner is easy enough to allege. It is significant, however, that there is no report from, for instance, a loss adjuster or some similar independent person to indicate such loss, nor was there an explanation of what became of the so-called unmerchantable seasoning or whether there was any salvage. Ordinarily, the petitioner should have been given an opportunity to inspect the same and make its own assessment.

The director had affirmed in an affidavit that the company has been insolvent for many years, claiming that that was due to the nature in which its operations had been funded, namely, through shareholders' advances. He affirmed further that the company was insolvent only because of large shareholders' advances, that this was a policy taken by the shareholders who had deliberately undercapitalized the company, that the company's initial capitalization had remained unchanged since it was acquired in 1984 and that due to this policy, the company had always been insolvent. Counsel for the company argued that if the shareholders' advances were converted to capital, the company would not be insolvent. The submission was purely suppositional. Counsel had no authority to speak on behalf of the person or persons who made at least half of those advances. The argument was of no assistance to the company in its task of having to establish that it was able to pay its debts.

In fact, an affidavit-in-reply by the director showed that as at 30 June 1993, a sum of US$734,715 was due and owing to the petitioner in the company's books.

The petitioner invoked s 218(1)(e) and (i) in support of its petition to wind up the company. The provisions of s 218(1)(e) raise a presumption that the company is unable to pay its debts if, after 21 days of service of the notice of demand, the company has failed or neglected to pay the debt.

In the case of *MBf Finance Bhd v Sri Hartamas Development Sdn Bhd* [1992] 1 CLJ 160, the company contended that it was not insolvent as it had many assets which albeit were 'locked up' in pieces of land having assets amounting to RM597,590,000. The learned judge said at p 169:

> What the company was saying was that it had assets but all the assets were locked up in landed properties. In my opinion the company had failed to

show that it was not insolvent. In *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 (an appeal from the Singapore Court of Appeal), the Privy Council in its decision at p 54 said:

> 'There was also cited to the Chief Justice a passage from *Buckley on the Companies Act* (13th Ed) at p 460, dealing with "commercial insolvency", that is, of the company being unable to meet current demands upon it', and containing the following observations, which are, in the opinion of the Board, impeccable:
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> > "In such a case, it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up."

In the Supreme Court case of *Lian Keow Sdn Bhd (In Iquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at p 454, Seah SCJ speaking in regard to the meaning of the words 'unable to pay its debts':

> The meaning of the words 'a person unable to pay his debt as they became due from his own money' in s 53(1) of the Bankruptcy Act 1967 (as amended) was considered by me in the unreported case of *In Re Chong Khian (Bankrupt)* (Kuching High Court No K45 of 1978).
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> After referring to some passages in the Australian cases of *Bank of Australasia v Hall* (1907)4 CLR 1514 (at pp 1528 and 1543) and *Rees v Bank of New South Wales* (1963–64) 111 CLR 210 (at pp 218 and 230) I held that the question whether a debtor was solvent at a particular time was a question of fact. I also made the following observations:
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> > 'The question is not whether the debtor would be able, if time were given to him, to pay his debts out of his assets, but whether he is presently able to do so with moneys actually available ...'
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> and
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> > 'If ... the debtor's position is such that he has property ... which if realized would produce sufficient money to pay all his indebtedness, and if that property is in such a position as to title and otherwise that it could be realized in time to meet the indebtedness as the claims mature .... he cannot be said to be unable to pay his debts as they become due from his own moneys ...'.
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> In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realize in time to meet the debts as they become due. It is not sufficient that the assets might be realizable at some future date after the debts have become due and payable.

The presumption having arisen, the onus is on the company to show that it was able to pay its debts. The company failed to do so. Upon a consideration of all the facts and circumstances of this application, I find

that the petitioner has made out a prima facie case as aforesaid. Whilst ordinarily a company should not be deprived of its right to continue trading simply because a winding-up petition has been presented against it, in this instance the winding-up petition will be heard only after the D4 action is finally determined. It is not known when that event will take place. With a history of continuous and continuing trading losses, I found that rights of the creditors should not be further eroded by the company continuing to trade, in all probability at a loss, to the disadvantage of the creditors. The company was being run under the directorship of the director and his brother.

Counsel for the petitioner had submitted that despite there being solicitors representing the company, it had continued to make payments after the presentation of the winding-up petition in contravention of ss 223 and 293 of the Act, for no application to validate the payments was made.

The court then enquired from counsel for the company whether the submission was correct and if so how much had been paid out from the accounts of the company since the presentation of the winding-up petition. Counsel for the company then requested an adjournment to take instructions. The adjournment was granted.

When hearing resumed, the court was given a list of payments made. The list showed that some RM8,610,000 had been paid out from the accounts of the company as at 30 April 1994.

It was clear that the company had been making preferential payments to some creditors in contravention of ss 223 and 293 of the Act. No application for a validation order had been made. The company had admitted that it had made payments to the extent of RM8,610,000 after the presentation of the petition till the 30 of April 1994.

Section 223 of the Act provides:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

Section 293(1) and (2) provides:

> (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.
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> (2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —
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> (a) in the case of a winding up by the Court —
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> (i) the date of the presentation of the petition; or
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> (ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date

A upon which the resolution to wind up the company voluntarily, is passed, whichever is the earlier; and

(b) in the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.

B In the case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, the Supreme Court held that the bankruptcy rules as to fraudulent preference are applied to the winding up of a company by the court by virtue of s 293(1) of the Act. In that case, the first appellant company was ordered to be wound up by the court on a petition presented before the end of the six months after the C making of the fraudulent preferential transfers to the first respondent. It followed that the transfers of the first, second and third portions of the estate to the first respondent were therefore void as against the second appellant by reason of s 53(1) of the Bankruptcy Act 1967 (as amended) read with s 293(1) of the Act. The Supreme Court further held that the D court should adopt the practice of the courts in England that no validation order would be made if the transfer was proved to be a fraudulent preference and therefore void as against the Official Assignee under s 53(1) of the Bankruptcy Act 1967.

Sections 303(3) and 304(1) of the Act read as follows:

E 303(3) If in the course of the winding up of a company or in any proceedings against a company it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time, of the company being able to pay F the debt, the officer shall be guilty of an offence against this Act.

304(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or G contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

H In the case of *R v Grantham* [1984] 3 All ER 166; [1984] 2 WLR 815, the court, in dealing with s 332(1) of the English Companies Act 1948 which is to all intents and purposes similar to s 304(1) of the Act, held as follows, as per the headnote ([1984] 3 All ER 166):

I Where a person who takes part in the management of a company's affairs obtains credit or further credit for the company when he knows that there is no reason for thinking that funds will become available to pay the debt when it becomes due or shortly thereafter he may be found guilty of an offence under s 332 of the Companies Act 1948 of carrying on the company's affairs 'with intent to defraud creditors of the company'. For a person to be

> found guilty of an offence under s 332 it is not necessary for the prosecution to prove that there was no reasonable prospect of the company's creditors ever receiving payment of their debts ... .

In the case of *Re Cyona Distributors Ltd* [1967] Ch 889; [1967] 1 All ER 281; [1967] 2 WLR 369, Lord Denning MR, commenting on the said s 332(1), said ([1967] Ch 889 at p 902; [1967] 1 All ER 281 at p 284; [1967] 2 WLR 369 at p 375):

> In my judgement, that section is deliberately phrased in wide terms so as to enable the court to bring fraudulent persons to book. If a man has carried on the business of a company fraudulently, the court can make an order against him for the payment of a fixed sum (see *Re William C Leitch Brothers Ltd (No 1)* [1932] 2 Ch 71; [1932] All ER Rep 892). An order can be made either at the suit of the liquidator, etc, or of a creditor. The sum may be compensatory; or it may be punitive. The court has full power to direct its destination. The words are quite general: 'all or any of the debts or other liabilities of the company as the court shall direct'.

In view of the foregoing facts, I found that the property of the company was in jeopardy and that the petitioner would be in a worse position if the appointment of a provisional liquidator was delayed and outweighed the consequences to the company which had been continuously trading at a loss and admittedly so.

Accordingly, I made an order for the appointment of provisional liquidators pending disposal of the winding-up petition.

Application allowed.

Reported by Anne Khoo